(1)

No. 96-792

In The

Supreme Court of the United States

October Term, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE THIRTY-NINE COUNTIES OF THE STATE OF WASHINGTON* AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The State of Washington abandoned its mandatory grand jury practice some 80 years ago.[2] While grand juries are still convened on rare occasions in Washington[3], the vast majority of Washington prosecutions are instituted on information filed by the prosecutor. On many occasions the information is filed without a prior judicial determination of "probable cause". Washington's charging procedure, which is specifically authorized by the Washington Constitution[4], received this Court's approval in *Beck v. Washington*, 369 U.S. 541, 545 (1962).

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[1] Counsel for both petitioner and respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

[2] Washington Laws 1909, c. 87.

[3] Grand juries in Washington are convened only on special occasions and for specific purposes. Between 1917 and 1957, the most populous county in Washington, King County, had summoned a total of eight grand juries. *Beck v. Washington*, 369 U.S. 541, 545 (1962). These grand juries were utilized primarily to investigate corruption. The statute under which these eight grand juries were convened, Chapter 10.28 RCW, was repealed in 1971.

The new grand jury statute, Chapter 10.27 RCW, created a "special inquiry judge". The "special inquiry judge" performs many of the investigative functions of a grand jury. *See generally In re Special Inquiry Judge*, 899 P.2d 800 (Wash. App. 1995). Grand juries, therefore, have been used even less frequently in Washington than when this Court rendered its opinion in *Beck v. Washington, supra*.

[4] Wash. Const. art. 1, § 25 provides that:

> Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Thousands of criminal cases each year are initiated by information in the State of Washington by Prosecuting Attorneys and their deputies.[5] While a statute provides that the only document needed to initiate a criminal charge is an information[6], local court rules in two counties, including King County where the petitioner, Lynne Kalina, is employed, require the prosecutor to file an additional document.[7] This additional document is

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[5] Both juvenile offender cases and criminal cases filed in the Washington superior courts are initiated by information. Washington Criminal Rule 2.1; RCW 13.40.070. In 1993, 29,765 criminal cases and 24,360 juvenile offender cases were filed in the superior courts of Washington. In 1994, 30,395 criminal cases and 25,883 juvenile offender cases were filed in the superior courts of Washington. In 1995, 33,965 criminal cases and 27,716 juvenile offender cases were filed in the superior courts of Washington. *See* Office of the Administrator for the Courts, *Caseloads of the Courts of Washington 1995*, at 38 (1996).

[6] RCW 10.37.010 provides that:

> No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

[7] King County LCrR 2.2 provides as follows:

> Warrant Upon Indictment Or Information
>
> (b) Issuance of Summons in Lieu of Warrant.
>
> (1) When Summons Must Issue. Absent a showing of cause for issuance of a warrant, a summons shall issue for a person who has been released by a magistrate on the preliminary appearance calendar. The person shall be directed to appear on the arraignment calendar one week after the date of his/her release.
>
> (g) Information to Be Supplied to the Court. *When a charge is filed in Superior Court and a warrant is requested, the Court shall be provided with the following information about the person charged:*
>
> (1) The pretrial release interview form, completed by either a bail interviewer or by the defense counsel.
>
> (2) *By the prosecuting attorney, insofar as possible.*
>
> *(A) A brief summary of the alleged facts of the charge;*
>
> (B) Information concerning other known pending or potential charges;
>
> (C) A summary of any known criminal record;
>
> (D) Any other facts deemed material to the issue of pretrial release.
>
> (3) Any ruling of a magistrate at a preliminary appearance.
>
> [Emphasis added.]

generally referred to in Washington practice as a "certificate of probable cause".

Thurston County LCrR 2.2, provides as follows:

> Warrant Upon Indictment Or Information
>
> (g) Information to be Supplied to the Court. *When a charge is filed in the Superior Court and an order for a warrant or a summons is requested, the court shall be provided with the following information about the person charged:*
>
> (1) The pretrial release interview form, if one has been completed by the Pretrial Services Unit.

The filing of the information, under Washington law, can trigger the start of Washington's court rule speedy trial period.[8] A failure to secure the presence of the defendant in court within 104 days of the filing of the information may result in the dismissal of charges with prejudice.[9] Both the Washington courts and the Washington legislature have placed the burden of securing the presence of the defendant in court upon the prosecutor.[10]

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(2) *By the prosecuting attorney, insofar as possible:*

(A) A brief summary of the alleged facts of the charge;

(B) Information concerning other known pending or potential charges;

(C) A summary of any known criminal record;

(D) Any other facts deemed material to the issue of pretrial release.

(3) Any ruling of the court at a preliminary hearing or appearance.

[Emphasis added.]

Many Washington prosecuting attorneys in other counties file certifications of probable cause that contain the information required by the Thurston County and King County local rules because of the myriad uses courts make of the certifications of probable cause throughout the pre-trial, trial, and appeal portions of a criminal case. *See infra* at 5-7.

[8] *State v. Greenwood*, 845 P.2d 971 (Wash. 1993); *State v. Striker*, 557 P.2d 847 (Wash. 1976).

[9] *See generally, State v. Stewart*, 922 P.2d 1356, 1360 (Wash. 1996); *Greenwood*, 845 P.2d at 974; *Striker*, 557 P.2d at 852.

[10] RCW 36.27.020(6); *State v. Anderson*, 855 P.2d 671 (Wash. 1993); *State v. Greenwood, supra.*

In order to timely secure the defendant's presence for trial, the prosecuting attorney will often request a warrant of arrest.[11] Consistent with this Court's opinion in *Gerstein v. Pugh*, 420 U.S. 103 (1975), such a request must be accompanied by a certificate or statement of probable cause to support the charge. Under Washington law, the certificate of probable cause can consist solely of a summary of the contents of the police reports.[12]

The certificate of probable cause is utilized by the court and the prosecution for purposes other than obtaining a warrant of arrest. The facts contained in the certificate of probable cause are considered in determining the amount of bail or other conditions of pretrial release.[13] Facts contained in the certificate of probable cause are considered in determining whether a defendant had notice of all of the elements of an offense.[14]

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[11] Prosecutors' attempts to satisfy the Washington speedy trial court rule by mailing letters to the defendants that advise them of the pending charges have had mixed success in the Washington courts. *See, e.g., State v. Marler*, 911 P.2d 420 (Wash. App.), *review denied*, 919 P.2d 601 (Wash. 1996); *State v. Bazan*, 904 P.2d 1167 (Wash. App. 1995), *review denied*, 919 P.2d 600 (Wash. 1996).

[12] Washington Criminal Rule 2.2(a); Washington Juvenile Court Rule 7.5(b).

[13] Washington Criminal Rule 3.2(a).

[14] *State v. Kjorsvik*, 812 P.2d 86 (Wash. 1991); *State v. Garcia*, 829 P.2d 241 (Wash. App.), *review denied*, 838 P.2d 1143 (Wash. 1992); *State v. Bryant*, 828 P.2d 1121 (Wash. App.), *review denied*, 833 P.2d 1389 (Wash. 1992).

The information contained in the certificate of probable cause can form the factual basis for a guilty plea.[15] The facts contained in the certificate of probable cause may be considered in deciding whether a defendant is entitled to a judgment of acquittal by reason of insanity.[16]

The facts in the certificate of probable cause are relied upon to establish whether a spouse is competent to testify against a defendant without the defendant's permission.[17] Information in a certificate of probable cause can establish whether a prior conviction is admissible for impeachment purposes under Washington Evidence Rule 609.[18] The material in a certificate of probable cause can be utilized by the court in determining a proper sentence.[19]

Facts contained in a certificate of probable cause can provide the background facts for Washington's appellate courts.[20] Information in a certificate of probable cause has

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[15] *See, e.g., State v. Saas*, 820 P.2d 505 (Wash. 1991); *State v. Arnold*, 914 P.2d 762, 765 (Wash. App.) ("The judge stated positively that he always reads and considers those certificates, and that he did so this time [when accepting a guilty plea]"), *review denied*, 925 P.2d 989 (Wash. 1996).

[16] *State v. Autrey*, 794 P.2d 81 (Wash. App.), *review denied*, 802 P.2d 127 (Wash. 1990).

[17] *State v. Thornton*, 835 P.2d 216 (Wash. 1992).

[18] *See, e.g., State v. Schroeder*, 834 P.2d 105 (Wash. App. 1992).

[19] *State v. Overvold*, 825 P.2d 729 (Wash. App. 1992); *State v. Cooper*, 816 P.2d 734 (Wash. App. 1991); *State v. Tindal*, 748 P.2d 695 (Wash. App. 1988).

[20] *See, e.g., State v. Herzog*, 771 P.2d 739 (Wash. 1989); *State v. Becker*, 801 P.2d 1015 (Wash. App. 1990).

been utilized by the Washington Supreme Court to determine which portion of an obscenity statute applied to a particular case.[21]

The Ninth Circuit's opinion in *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S. Ct. 1079 (1997), has stripped prosecutors of their absolute immunity for engaging in routine procedures under Washington law for initiating and pursuing criminal prosecutions. The Ninth Circuit's opinion, if left intact, will severely impact prosecutors' ability to vigorously and fearlessly perform their duty. The Ninth Circuit's ruling diverts scarce prosecutorial resources from the enforcement of criminal laws to the defense of civil lawsuits.

ARGUMENT

Public prosecutors must administer their offices with courage and independence. Both of these qualities are impeded when the prosecutor is made subject to suit by those whom s/he accuses and fails to convict. *Imbler v. Pachtman*, 424 U.S. 409, 423-24 (1976), quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935). Accordingly, this Court has provided prosecutors with absolute immunity under § 1983 law suits for actions intimately associated with the judicial phase of the criminal process. *Imbler*, 424 U.S. at 430.

The Ninth Circuit ignores the teachings of *Imbler* in its decision in *Fletcher v. Kalina, supra*. The Ninth Circuit,

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[21] *State v. Reece*, 757 P.2d 947 (Wash. 1988), *cert. denied*, 493 U.S. 812 (1989).

focusing on the issuance of the arrest warrant, instead of the purpose for the warrant and the warrant's relationship to the charging function, determined that prosecutors are only entitled to qualified immunity for any errors contained in the certificate of probable cause.[22] Other Circuits, which have focused on the purpose of a post-charging arrest warrant, have had little difficulty in finding that absolute immunity should be extended to prosecutors who request arrest warrants.[23]

The Ninth Circuit decision in *Fletcher v. Kalina*, assumes the sole purpose of the certificate of probable cause is to secure a warrant of arrest. Such is not the case. In Washington, the certificate of probable cause is intimately associated with the judicial process in other ways, as well.

Generally, the certificate of probable cause is the only document in the court file that outlines in detail the facts in every criminal prosecution. The certificate of probable cause is utilized by the courts during the entire judicial process, beginning with the filing of an information,

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[22] *Fletcher v. Kalina*, 93 F.3d at 655.

[23] *See Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983); *Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996); *Pinaud v. Suffolk*, 52 F.3d 1139, 1150 (2d Cir. 1995); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *cf. Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case); *Erlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case).

through sentencing and appeal. As such, the certificate of probable cause is prepared by the prosecutor in his or her role as an advocate and is within the continuum of initiating and presenting a criminal case. Prosecutors must enjoy absolute immunity for drafting, signing, and filing the certificates. By likening a warrant secured by a police officer to a prosecutor's certificate of probable cause, the Ninth Circuit erred.

The act of obtaining an arrest warrant after or in conjunction with the filing of the information is not an investigative function. The prosecutor, by filing the motion for warrant of arrest, is not seeking to obtain more information before deciding that the case should be prosecuted. Rather, the act of preparing a certificate of probable cause and the act of obtaining an arrest warrant in conjunction with the filing of a criminal information is functionally part of the initiation of a criminal proceeding. As the Tenth Circuit has stated:

> [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a

> prosecution would be futile.[24] Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under *Imbler*.

Roberts v. Kling, 104 F.3d 316, 320 (10th Cir. 1997), citing *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983).

While absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity, the fate of prosecutors with qualified immunity depends upon whether the government officials performing the discretionary function violated a clearly established statutory or constitutional right of which a reasonable person would have known.[25] A prosecutor who merely enjoys qualified immunity must answer in court each time a person charges him or her with wrongdoing. This diverts the prosecutor's energy and attention from the pressing duty of enforcing the criminal laws.[26] Moreover, as this Court noted in *Imbler*, suits that survive the pleadings would pose substantial danger of liability even to the honest prosecutor:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and

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[24] This point is particularly true in Washington as the Washington Supreme Court has interpreted the Washington Court Rules as absolutely prohibiting a trial from beginning unless the defendant is present. *State v. Jackson*, 878 P.2d 453 (Wash. 1994); *State v. Hammond*, 854 P.2d 637 (Wash. 1993).

[25] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[26] *Imbler*, 424 U.S. at 424.

> even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Imbler, 424 U.S. at 425-26.

The Ninth Circuit's opinion has created great uncertainty about how prosecutors can balance their potential civil liability with strict and fair law enforcement. Washington prosecutors generally lack the resources for conducting their own investigations. They determine whether to file charges on the basis of investigations conducted by law enforcement agencies. The Ninth Circuit's opinion casts the legitimacy of this procedure into doubt. It suggests that prosecutors will be liable if they should have known that the facts reported by police are false. This requires them to conduct investigations of some indeterminate scope.

The Ninth Circuit's opinion has created great uncertainty about how prosecutors can balance their potential civil liability with their obligations to provide the court with summaries of the alleged facts of the charges under various local court rules or in connection with requests for conditions of release or arrest warrants. Following the Ninth Circuit opinion in *Fletcher v. Kalina*, prosecutors wonder if they must now submit every police report and witness statement to the court in support of the charge in order to avoid a later lawsuit for the omission of an alleged material fact. Such a practice would have a dramatic impact upon courts, as judges must pore over

copious documents to seek out those facts that might support the filed charges. This practice could also impede the investigation and prosecution of related crimes or co-participants by prematurely releasing facts to the community at large. The alternative of having investigative police officers personally sign affidavits or declarations once a prosecutor determines that probable cause exists would only delay the initiation of charges and would interfere with the investigation of other crimes by unnecessarily removing officers from the streets.[27]

Following the Ninth Circuit opinion in *Fletcher v. Kalina*, prosecutors now wonder if a decision to rely upon police officers' reports in preparation of certificates of probable cause instead of personally re-interviewing witnesses will engender liability for failure to investigate. Prosecutors wonder if a decision to rely upon prosecutor prepared affidavits that summarize the evidence in support of a request for a post-charging warrant of arrest instead of requiring the complainant and other witnesses to appear personally before the judge for questioning will engender liability for omitting a fact that might later prove exculpatory.

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[27] Washington law only requires a police report to be sworn under oath when the report is prepared in connection with an impaired driver's refusal to submit to a breath or blood test to determine the alcohol content of the impaired driver's breath or blood, *see* RCW 46.20.308(6), or when the police report are incorporated into a criminal citation or notice of civil traffic infraction, *see* Wash. Crim. Rule for Courts of Limited Jurisdiction 2.1(b)(5); RCW 46.63.090. None of these documents are used in the prosecution of felony charges.

Finally, prosecutors wonder whether resurrection of the grand jury system is the only way to avoid suits for damages from a defendant who resents being arrested to answer a charged crime.[28] Resurrection of the grand jury would, as noted by a recent legislative study, carry substantial cost[29] and would dramatically slow the processing of felony cases.

CONCLUSION

This Court should reverse the Ninth Circuit's decision in *Fletcher v. Kalina*, and provide Washington's prosecutors with the absolute immunity necessary for them to "[p]rosecute all criminal . . . actions in which the state . . . may be a party . . . "[30] and to "[i]nstitute and prosecute proceedings before magistrates for the arrest of

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[28] The Federal Courts appear to agree that prosecutors are immune from § 1983 liability for their conduct before a grand jury. *See, e.g., Hill v. City of New York*, 45 F.3d 653, 661 (2nd Cir. 1995); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 740 (1995).

[29] *See* Washington Senate Staff Memorandum, *Grand Juries* (May 15, 1996). A copy of the memorandum, minus attachments, is contained in appendix A.

[30] RCW 36.27.020(4).

persons charged with or reasonably suspected of felonies"[31] without apprehension of personal consequences.

Respectfully submitted this 23rd day of April, 1997.

Respectfully submitted,

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[31] RCW 36.27.020(6).

APPENDIX 1

(LOGO)

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Senator Adam Smith
Chair

Washington State Senate

Law and Justice Committee

MEMORANDUM

Date: May 15, 1996

From: Cynthia Runger, staff counsel

To: Senator Roach

Subject: Grand Juries

You requested the following information on grand juries:

1) Are grand juries established by the constitution in this state? 2) How often have they been summoned? 3) How assessable are grand juries to the general public? 4) How much do grand juries cost? 5) How have grand juries been used in this state? and 6) How do grand juries work in other states. Below are responses to your inquiries.

ARE GRAND JURIES ESTABLISHED BY THE CONSTITUTION IN THIS STATE?

Yes. The Constitution of the State of Washington authorizes offenses to be prosecuted either by grand jury

indictment or by information (see Washington State Constitution Article 1 § 25 and Article 1 § 26 (copies attached)).

HOW OFTEN HAVE GRAND JURIES BEEN USED IN THIS STATE?

I have inquired at several county prosecutors offices, the Office of the Administrators for the Courts, and other legal organizations. I have not been able to obtain a specific quantitative response, however, I have been told that grand juries have not been used often in this state. It appears that the general consensus among prosecutors is that: 1) grand juries are time consuming, costly, and require additional personnel that many offices do not have; 2) they add an unnecessary layer to the already bogged-down court system; and 3) finding jurors for grand juries would be an unduly burdensome task since counties already have difficulty getting jurors to respond to short jury terms.

HOW ASSESSABLE ARE GRAND JURIES TO THE GENERAL PUBLIC IN THIS STATE?

The statutory provision governing grand juries is set forth in RCW 10.27.030. In Washington grand juries may be summoned by a majority of a county's superior court judges if the public interest so demands. The court may summon a grand jury on it's own if there is sufficient evidence of criminal activity or corruption or upon a petition to the court by a public attorney. There is no mechanism for direct public access to the court for summoning a grand jury. Conceivably, a citizen could provide

a court with sufficient evidence of criminal activity or corruption, thereby convincing a court that the public interest so demands that a grand jury be summoned, but there is no explicit statutory authority for this type of action. Nebraska and Oklahoma are two states that allow qualified electors to petition the court for a grand jury (see attached chart entitled, "A Comparison Chart of Grand Juries in 10 States").

HOW MUCH DO GRAND JURIES COST?

This answer is difficult to ascertain in definitive quantitative terms because costs of grand juries vary with each case. Numerous factors must be considered in determining the cost of a grand jury. By statute a grand jury consists of twelve persons who are authorized to sit a term of no more than 60 days. A more complex case may have a considerable cost because of factors such as lengthier investigations, court costs and attorneys fees.

HOW HAVE GRAND JURIES BEEN USED IN THIS STATE?

Below are examples of grand jury cases in this state.

State v. Ingeles (1940). A grand jury was summoned to investigate accounting matters for funds contributed toward the political campaign of a gubernatorial candidate in 1936.

State v. Bell (1962). A grand jury was impaneled August 25, 1958, and proceeded to investigate certain alleged criminal activities arising in connection with the construction of the Priest Rapids Dam on the Columbia River

by Public Utility District No. 2 of Grant County (PUD). There had been rumors of substantial gratuities and payments of money made by the prime contractor to officers of the PUD.

State v. Twitchell (1963). In January 1960, a grand jury convened in Snohomish County to investigate a Snohomish County Sheriff who allegedly wilfully neglected his duty in that he knowingly, without making a complaint and without making an arrest, permitted the keeping of a house of prostitution and the practice of prostitution within the county.

State v. Robinson (1973). A King County grand jury was convened to investigate a Seattle police officer for allegedly soliciting and receiving bribes.

State v. Carroll (1973). In 1971 a grand jury was convened in King County for the purpose of investigating possible bribery and corruption among police and public officials.

State v. Sponburgh (1974). In 1971, a King County grand jury was convene to investigate members of the Washington State Liquor Control Board in connection with liquor administered by the liquor board.

State v. Torgenson (1978). A grand jury was convened to investigate whether a county commissioner engaged in conspiring with a supervisor of a county road district and his assistant to use county labor and materials for his own benefit and failing to investigate and act to protect government assets even after receiving a report that the same road supervisor and his assistant had stolen county property.

HOW DO GRAND JURIES WORK IN OTHER STATES?

Please see attached chart entitled, "A Comparison Chart of Grand Juries in 10 States."